

## Internal Revenue Service

Department of the Treasury  
Washington, DC 20224

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Person To Contact:

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### Legend

Distributing =

Sub =

Controlled 2 =

Controlled 1 =

Business A =

Business B =

Business C =

Business D =

Business E =

Business F =

Debentures =

a =

b =

c =

Structure =

Facility =

Date 1 =

Date 2 =

Date 3 =

Dear :

This letter responds to your June 5, 2008 request for rulings regarding certain federal income tax consequences of a partially completed transaction. The information submitted in that request and in later correspondence is summarized below.

The rulings contained in this letter are based on facts and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party. This office has not verified any of the material submitted in support of the request for rulings. Verification of the information, representations, and other data may be required as part of the audit process. Moreover, this office has not reviewed any information pertaining to, and has made no determination regarding whether the Internal Spin-off and the Public Spin-off (both defined below): (i) satisfy the business purpose requirement of § 1.355-2(b) of the Income Tax Regulations, (ii) are being used principally as a device for the distribution of the earnings and profits of any of the distributing corporations or the controlled corporations (see § 355(a)(1)(B) of the

Internal Revenue Code (the “Code”)) and § 1.355-2(d), or (iii) are part of a plan (or series of related transactions) pursuant to which one or more persons will acquire directly or indirectly stock representing a 50% or greater interest in any of the distributing corporations or the controlled corporations (see § 355(e) and § 1.355-7).

### **Summary of Facts**

Distributing is a publicly-held domestic corporation that has been a real estate investment trust (as defined in § 856 ) since Date 1. Distributing wholly owns Sub, a domestic corporation that is a qualified real estate investment trust subsidiary (within the meaning of § 856(i)) and is therefore disregarded as separate from Distributing for federal income tax purposes. Sub wholly owns Controlled 2, a domestic corporation that is a taxable real estate investment trust subsidiary (within the meaning of § 856(l)) and is taxed as a subchapter C corporation for federal income tax purposes.

Distributing conducts Business A and Business B, and Controlled 2 conducts Business B, Business C, Business D, Business E and Business F.

Financial information has been submitted indicating that Business A, Business B, Business C, Business D, Business E, and Business F have had gross receipts and operating expenses representative of the active conduct of a trade or business for each of the past five years.

### **The Proposed Transactions**

In order to obtain certain goals and objectives, management of Distributing wishes to separate Business A, Business B, Business C, and Business D (collectively, the “Retained Businesses”) from Business E, Business F and certain assets of the Distributing group that are geographically related to Business E and Business F (collectively, the “Distributed Businesses”). In order to complete the separation, management has proposed and partially completed the following steps (collectively, the “Transactions”):

(i) Controlled 2 formed Controlled 1 as a domestic limited liability company and Controlled 1 has elected to be taxed as a corporation pursuant to § 301.7701-3.

(ii) Sub will distribute its Controlled 2 stock to Distributing.

(iii) Controlled 2 will contribute the assets associated with the Retained Businesses (the “Retained Business Assets”) to Controlled 1. In exchange for the Retained Business Assets, Controlled 1 will assume certain liabilities associated with the Retained Business Assets. Controlled 1 will assume certain third party indebtedness associated with the Retained Businesses (the “Assumed Liabilities”) that Controlled 2 had originally assumed from Distributing at the time of Controlled 2’s

formation. Controlled 2 will draw \$a under a newly negotiated line of credit, and contribute an amount of cash to Controlled 1 at the time Controlled 2 contributes the Retained Businesses to Controlled 1 (the “Cash Transfer”) (the Cash Transfer together with Controlled 1’s assumption of the Assumed Liabilities, the “Pre-Spin Refinancing”) (and the contribution of the Retained Business Assets together with the Cash Transfer and the Assumed Liabilities, the “Contribution”).

(iv) Controlled 2, which had at the time of its formation assumed from Distributing the obligation to pay all amounts due with respect to certain Debentures, \$b principal amount outstanding due Date 2 (the “Debentures,” and such obligation, the “Retained Obligation”), will retain such Retained Obligation following the Spin-offs (as defined below). Sub was the original issuer of the Debentures, and the third party lenders under the Debentures did not release Sub at the time Controlled 2 assumed the obligation to pay the Debentures. Accordingly, Sub would remain liable to the holders of the Debentures in the event that Controlled 2 were unable to make interest payments as due on the Debentures or to repay the principal amount due when the Debentures mature on Date 2. Distributing and Controlled 2 intend to memorialize certain terms of Controlled 2’s retention of the Retained Obligation in an agreement (the “Retained Obligation Agreement”). Neither Distributing nor Controlled 2 (nor any entity which they own or may own) will receive any additional consideration for Controlled 2’s continuing Retained Obligation under the Retained Obligation Agreement. The Retained Obligation will remain unsecured, but in the unexpected event that Distributing is required to satisfy the Retained Obligation on behalf of Sub because Controlled 2 is unable to pay interest or principal on the Debentures when due, c will occur.

(v) Distributing will cause Sub to transfer the Structure to Controlled 2 (“Contribution 2”).

(vi) Controlled 2 will increase the number of shares that it is authorized to issue and will issue such additional shares to Distributing (the “Issuance”). The number of such additional shares will equal the total number of Controlled 2 shares to be distributed by Distributing in the Public Spin-off minus the number of Controlled 2 shares held by Distributing immediately prior to the Issuance.

(vii) Controlled 2 will distribute the stock of Controlled 1 to Distributing (the “Internal Spin-off”).

(viii) Distributing will distribute its Controlled 2 stock to its shareholders on a pro rata basis (the “Public Spin-off”) (and together with the Internal Spin-off, the “Spin-offs”). In the event that Distributing’s board of directors determines not to distribute a whole number of Controlled 2 shares with respect to each Distributing share, shareholders of Distributing will receive cash in lieu of fractional shares.

(ix) Distributing, Sub, Controlled 2, and Controlled 1 expect to enter into certain agreements that will take effect immediately after the Public Spin-off, including

agreements related to: (i) transition services such as information technology and payroll (the “Transition Services Agreements”), (ii) supply requirements (the “Supply Agreements”), (iii) tax allocations (the “Tax Sharing Agreement”), and (iv) certain employee matters (the “Employee Matters Agreement”) (collectively, the “Agreements”).

Immediately after the Spin-offs, Distributing will actively conduct, both directly and indirectly (through Sub and Controlled 1), the Retained Businesses, and Controlled 2 will actively conduct the Distributed Businesses.

## **Representations**

### **The Contribution and the Internal Spin-off**

The following representations have been made regarding the Contribution and the Internal Spin-off:

(a) The Internal Spin-off is being carried out for the corporate business purposes of facilitating the Public Spin-off and its business purposes (as described below), and is motivated, in whole or substantial part, by such corporate business purposes.

(b) The Internal Spin-off is not used principally as a device for the distribution of the earnings and profits of Controlled 2, Controlled 1, or both.

(c) The Internal Spin-off is not part of a plan or series of related transactions (within the meaning of § 1.355-7) pursuant to which one or more persons will acquire directly or indirectly stock representing a 50 percent or greater interest (within the meaning of § 355(d)(4)) in Controlled 2 or Controlled 1 (including any predecessor or successor of any such corporation).

(d) The indebtedness, if any, owed by Controlled 1 to Controlled 2 after the Internal Spin-off will not constitute stock or securities.

(e) The five years of financial information submitted on behalf Business E and Business F (as conducted by Controlled 2) is representative of Controlled 2’s present operations, and with regard to Controlled 2, other than the closure of the Facility, there have been no substantial operational changes since the date of the last financial statements submitted.

(f) The five years of financial information submitted on behalf of Business B, Business C, and Business D (as presently conducted) is representative of Controlled 1’s operations, and with regard to Controlled 1, there have been no substantial operational changes since the date of the last financial statements.

(g) Following the Internal Spin-off, Controlled 2 and Controlled 1 will each continue the active conduct of its business, independently and with its separate

employees, except with respect to the services (if any) provided during the transition period under the Transition Services Agreements.

(h) No intercorporate debt will exist between Controlled 2 and Controlled 1 at the time of, or subsequent to, the Internal Spin-off except for obligations arising under the terms of the Transition Services Agreements, the Supply Agreements, the Employee Matters Agreement, the Retained Obligation Agreement, and certain indemnities in connection with the Spin-offs and the Tax Sharing Agreement.

(i) No property has been or will be transferred by Controlled 2 to Controlled 1 for which an investment credit allowed under § 46 has been or will be claimed.

(j) Payments made in connection with all continuing transactions between Controlled 2 and Controlled 1 will be for cost or for fair market value based on terms and conditions arrived at by the parties bargaining at arm's length.

(k) No two parties to the Internal Spin-off are investment companies as defined in § 368(a)(2)(F)(iii) and (iv).

(l) No part of the consideration to be distributed by Controlled 2 will be received by Distributing as a creditor, employee, or in any capacity other than that of a shareholder of Controlled 2.

(m) The total adjusted basis and the fair market value of the assets transferred to Controlled 1 by Controlled 2 each equals or exceeds the sum of (i) the total liabilities assumed (as determined under § 357(d)) by Controlled 1 and (ii) the total amount of money and other property (within the meaning of § 361(b)) (if any) received by Controlled 2 and transferred by it to its creditors and shareholders in connection with the plan of reorganization. The liabilities assumed (as determined under § 357(d)) in the Internal Spin-off were incurred in the ordinary course of business and are associated with the assets being transferred.

(n) The fair market value of the assets transferred by Controlled 2 to Controlled 1 will equal or exceed the sum of: (a) the amount of any liabilities assumed (within the meaning of § 357(d)) by Controlled 1 in the transaction, (b) the amount of any liabilities owed to Controlled 1 by Controlled 2 (if any) that are discharged or extinguished in the Internal Spin-off, and (c) the amount of any cash and the fair market value of any property (other than stock and securities permitted to be received under § 361(a) without the recognition of gain) received by Controlled 2 from Controlled 1 in the Internal Spin-off. The fair market value of the assets of Controlled 1 will exceed the amount of its liabilities immediately after the Internal Spin-off.

(o) Immediately before the Internal Spin-off, items of income, gain, loss, deduction and credit will be taken into account as required by the applicable

intercompany transaction regulations (see §§ 1.1502-13 and 1.1502-14 as in effect before the publication of T.D. 8597, 1995-2 C.B. 147, and as currently in effect; § 1.1502-13 as published by T.D. 8597). Furthermore, Controlled 2's excess loss account, if any, with respect to the Controlled 1 stock or the stock of any direct or indirect subsidiary of Controlled 1 will be included in income immediately before the Internal Spin-off to the extent required by applicable regulations (see § 1.1502-19).

(p) For purposes of § 355(d), immediately after the Internal Spin-off, no person (determined after applying § 355(d)(7)) will hold stock possessing 50% or more of the total combined voting power of all classes of Controlled 2 stock entitled to vote, or 50% or more of the total value of all classes of Controlled 2 stock, that was acquired by purchase (as defined in § 355(d)(5) and (8)) during the five-year period (determined after applying § 355(d)(6)) ending on the date of the Internal Spin-off.

(q) For purposes of § 355(d), immediately after the Internal Spin-off, no person (determined after applying § 355(d)(7)) will hold stock possessing 50% or more of the total combined voting power of all classes of Controlled 1 stock entitled to vote, or 50% or more of the total value of shares of all classes of Controlled 1 stock, that was either (i) acquired by purchase (as defined in § 355(d)(5) and (8)) during the five-year period (determined after applying § 355(d)(6)) ending on the date of the Internal Spin-off, or (ii) attributable to distributions on Controlled 2 stock that was acquired by purchase (as defined in § 355(d)(5) and (8)) during the five-year period (determined after applying § 355(d)(6)) ending on the date of the Internal Spin-off.

(r) None of the active businesses of Controlled 2 nor control of an entity conducting these businesses were acquired during the five-year period ending on the date of the Internal Spin-off in a transaction in which gain or loss was recognized (or treated as recognized) in whole or in part, except in connection with the expansion of an existing five-year trade or business.

(s) No property has been or will be transferred by Controlled 2 to Controlled 1 for which an investment credit allowed under § 46 has been or will be claimed.

(t) Immediately after the Internal Spin-off, either (i) no person will hold a 50% or greater interest (within the meaning of § 355(g)(3)) in Controlled 2 or Controlled 1, (ii) if any person holds a 50% or greater interest (within the meaning of § 355(g)(3)) in any disqualified investment corporation (within the meaning of § 355(g)(2)), such person will have held such interest in such corporation immediately before the Internal Spin-off, or (iii) neither Controlled 2 nor Controlled 1 will be a disqualified investment corporation (within the meaning of § 355(g)(2)).

(u) At the time of the Internal Spin-off, Controlled 2 will not have an excess loss account in the stock of Controlled 1.

The following representations have been made regarding Contribution 2 and the Public Spin-off:

(v) The Public Spin-off is being carried out for the following corporate business purposes and is motivated, in whole or substantial part, by one or more of such corporate business purposes: (i) to allow Distributing's management to focus on the Retained Businesses, while allowing Controlled 2 to obtain independent management that can focus on the Distributed Businesses; (ii) to allow both Distributing and Controlled 2 to allocate capital more appropriately and to eliminate conflicts over capital decisions; (iii) to allow both Distributing and Controlled 2 to more effectively attract management and key employees through an improved ability to offer equity-based compensation incentives; and (iv) to increase each company's ability to raise capital.

(w) The Public Spin-off is not used principally as a device for the distribution of the earnings and profits of Distributing or Controlled 2.

(x) The Public Spin-off is not part of a plan or series of related transactions (within the meaning of § 1.355-7) pursuant to which one or more persons will acquire directly or indirectly stock representing a 50% or greater interest (within the meaning of § 355(d)(4)) in Distributing or Controlled 2 (including any predecessor or successor of any such corporation).

(y) The indebtedness, if any, owed by Controlled 2 to Distributing after the Public Spin-off will not constitute stock or securities.

(z) The five years of financial information submitted on behalf of Distributing is representative of Distributing's present operations, and with regard to Distributing, there have been no substantial operational changes since the date of the last financial statements submitted.

(aa) The five years of financial information submitted on behalf of Business E and Business F (as conducted by Controlled 2) is representative of Controlled 2's present operations, and with regard to Controlled 2, other than the closure of the Facility, there have been no substantial operational changes since the date of the last financial statements submitted.

(bb) Following the Public Spin-off, Distributing and Controlled 2 will each continue the active conduct of its business, independently and with its separate employees, except with respect to the services provided during the transition period under the Transition Services Agreements.

(cc) No intercorporate debt will exist between Distributing and Controlled 2 at the time of, or subsequent to, the Public Spin-off except for obligations arising under the terms of the Transition Services Agreements, the Supply Agreements, the



Employee Matters Agreement, certain indemnities in connection with the Separation Agreement and the Tax Sharing Agreement, and the obligations arising upon a Repayment Event under the Retained Obligation Agreement.

(dd) No property will be transferred by Distributing to Controlled 2 for which an investment credit allowed under § 46 will be claimed.

(ee) Payments made in connection with all continuing transactions between Distributing and Controlled 2 will be for cost or for fair market value based on terms and conditions arrived at by the parties bargaining at arm's length.

(ff) No two parties to the Public Spin-off are investment companies as defined in § 368(a)(2)(F)(iii) and (iv).

(gg) No part of the consideration to be distributed by Distributing will be received by a shareholder as a creditor, employee, or in any capacity other than that of a shareholder of the corporation.

(hh) The total adjusted basis and the fair market value of the Structure and any other assets transferred to Controlled 2 by Distributing (or Sub) equals or exceeds the sum of (i) the total liabilities assumed (as determined under § 357(d)) by Controlled 2 and (ii) the total amount of money and other property (within the meaning of § 361(b)) (if any) received by Distributing (or Sub) and transferred by it to its creditors and shareholders in connection with the plan of reorganization. The liabilities assumed (as determined under § 357(d)) in the Public Spin-off were incurred in the ordinary course of business and are associated with the assets being transferred.

(ii) The fair market value of the Structure and any other assets transferred by Distributing (or Sub) to Controlled 2 will equal or exceed the sum of: (a) the amount of any liabilities assumed (within the meaning of § 357(d)) by Controlled 2 in the transaction, (b) the amount of any liabilities owed to Controlled 2 by Distributing (or Sub), if any, that are discharged or extinguished in the Public Spin-off, and (c) the amount of any cash and the fair market value of any property (other than stock and securities permitted to be received under § 361(a) without the recognition of gain) received by Distributing or Sub from Controlled 2 in the Public Spin-off. The fair market value of the assets of Controlled 2 will exceed the amount of its liabilities immediately after the Public Spin-off.

(jj) For purposes of § 355(d), immediately after the Public Spin-off, no person (determined after applying § 355(d)(7)) will hold stock possessing 50% or more of the total combined voting power of all classes of Controlled 2 stock entitled to vote, or 50% or more of the total value of all classes of Controlled 2 stock, that was acquired by purchase (as defined in § 355(d)(5) and (8)) during the five-year period (determined after applying § 355(d)(6)) ending on the date of the Public Spin-off.

(kk) For purposes of § 355(d), immediately after the Public Spin-off, no person (determined after applying § 355(d)(7)) will hold stock possessing 50% or more of the total combined voting power of all classes of Distributing stock entitled to vote, or 50% or more of the total value of shares of all classes of Distributing stock, that was either (i) acquired by purchase (as defined in § 355(d)(5) and (8)) during the five-year period (determined after applying § 355(d)(6)) ending on the date of the Public Spin-off, or (ii) attributable to distributions on Distributing stock that was acquired by purchase (as defined in § 355(d)(5) and (8)) during the five-year period (determined after applying § 355(d)(6)) ending on the date of the Public Spin-off.

(ll) None of the active businesses of Distributing nor control of an entity conducting these businesses were acquired during the five-year period ending on the date of the Public Spin-off in a transaction in which gain or loss was recognized (or treated as recognized) in whole or in part, except in connection with the expansion of an existing five-year trade or business.

(mm) No property will be transferred by Distributing (or Sub) to Controlled 2 for which an investment credit allowed under § 47 will be claimed.

(nn) Immediately after the Public Spin-off, either (i) no person will hold a 50% or greater interest (within the meaning of § 355(g)(3)) in Distributing or Controlled 2, (ii) if any person holds a 50% or greater interest (within the meaning of § 355(g)(3)) in any disqualified investment corporation (within the meaning of § 355(g)(2)), such person will have held such interest in such corporation immediately before the Public Spin-off, or (iii) neither Distributing nor Controlled 2 will be a disqualified investment corporation (within the meaning of § 355(g)(2)).

(oo) The issuance of cash in lieu of fractional shares of Controlled 2 stock, if any, merely represents the mechanical rounding off of such fractional share interests. It is undertaken solely for the purpose of avoiding the expense and inconvenience of issuing and maintaining fractional shares and will not represent separately bargained-for consideration. The total cash that will be paid in connection with the Public Spin-off in lieu of fractional shares of Controlled 2 stock is not intended to exceed one percent of the total consideration that will be distributed in the Public Spin-off. It is intended that no Distributing shareholder will receive cash in lieu of fractional shares in an amount equal to or greater than the value of one full share of Controlled 2 stock.

### **Rulings**

Based solely on the information submitted and the representations set forth above, we rule as follows regarding the Transactions:

### The Contribution and the Internal Spin-off

(1) The Contribution, followed by the Internal Spin-off, will qualify as a reorganization under § 368(a)(1)(D). Controlled 2 and Controlled 1 each will be “a party to a reorganization” under § 368(b).

(2) No gain or loss will be recognized by Controlled 2 on the Contribution (§§ 357(a) and 361(a)).

(3) No gain or loss will be recognized by Controlled 1 on the Contribution (§ 1032(a)).

(4) Controlled 2 will not recognize any gain or loss on the Internal Spin-off (§ 361(c)).

(5) Distributing will not recognize any gain or loss (and will not include any amount in income) upon receipt of the Controlled 1 stock in the Internal Spin-off (§ 355(a)(1)).

(6) The aggregate basis in the Controlled 1 stock and the Controlled 2 stock held by Distributing after the Internal Spin-off will equal the aggregate basis of the Controlled 2 stock immediately before the Internal Spin-off, allocated between the Controlled 1 and the Controlled 2 stock in proportion to the fair market value of each in accordance with § 358 and § 1.358-2(a)(2).

(7) Distributing’s holding period in each share of Controlled 1 stock received in the Internal Spin-off will include the holding period of the shares of Controlled 2 stock with respect to which the Internal Spin-off is made, provided that the Controlled 2 stock is held as a capital asset on the date of the Internal Spin-off (§ 1223(1)).

(8) Earnings and profits will be allocated between Controlled 1 and Controlled 2 in accordance with § 312(h) and § 1.312-10.

### Contribution 2 and the Public Spin-off

(9) Contribution 2, followed by the Public Spin-off, will qualify as a reorganization under § 368(a)(1)(D). Distributing and Controlled 2 each will be “a party to a reorganization” under § 368(b).

(10) No gain or loss will be recognized by Distributing on Contribution 2 (§§ 357(a) and 361(a)).

(11) No gain or loss will be recognized by Controlled 2 on Contribution 2 (§ 1032(a)).

(12) Distributing will not recognize any gain or loss on the Public Spin-off (§ 361(c)).

(13) The shareholders of Distributing will not recognize any gain or loss (and will not include any amount in their incomes) upon receipt of the Controlled 2 stock in the Public Spin-off (§ 355(a)(1)).

(14) The aggregate basis in the Distributing and the Controlled 2 stock held by each shareholder of Distributing after the Public Spin-off will equal the aggregate basis of the Distributing stock held by such shareholder immediately before the Public Spin-off, allocated between the Distributing and the Controlled 2 stock in proportion to the fair market value of each in accordance with § 358 and § 1.358-2(a)(2).

(15) The holding period of the Controlled 2 stock received by the shareholders of Distributing in the Public Spin-off will include the holding period of the Distributing stock with respect to which the Public Spin-off is made, provided that the Distributing stock is held as a capital asset by the shareholders of Distributing on the date of the Public Spin-off (§ 1223(1)).

(16) Earnings and profits (if any) will be allocated between Distributing and Controlled 2 in accordance with § 312(h) and § 1.312-10.

(17) A Distributing shareholder who receives cash in lieu of fractional shares of Controlled 2 stock will recognize gain or loss measured by the difference between the basis of the fractional share received and the amount of cash received (§ 1001). Any gain or loss will be treated as capital gain or loss, provided the fractional shares are held as capital assets on the date of the Public Spin-off (§§ 1221 and 1222).

### **Caveats**

No opinion is expressed about the tax treatment of the Transactions under other provisions of the Code and regulations or the tax treatment of any conditions existing at the time of, or effects resulting from, the Transactions that are not specifically covered by the above rulings.

In particular, no opinion is expressed regarding: (i) whether the Internal Spin-off and the Public Spin-off satisfy the business purpose requirement of § 1.355-2(b); (ii) whether the Internal Spin-off and the Public Spin-off are being used principally as a device for the distribution of the earnings and profits of the distributing corporation, the controlled corporation, or both (see § 355(a)(1)(B) and § 1.355-2(d)); (iii) whether the Internal Spin-off and the Public Spin-off are part of a plan (or series of related transactions) pursuant to which one or more persons will acquire directly or indirectly stock representing a 50% or greater interest in the distributing corporation or the controlled corporation (see § 355(e) and § 1.355-7); (iv) the federal income tax treatment of the transactions described in steps (ii) and (vi); (v) the potential application

of § 482 to payments made in connection with any continuing transactions between Controlled 2 and Controlled 1 and between Distributing and Controlled 2 that may be based on cost; and (vi) whether Distributing qualifies as a real estate investment trust for federal income tax purposes and whether Distributing satisfies any of the requirements set forth in subchapter M, part II of the Code.

### **Procedural Statements**

This ruling letter is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

A copy of this letter must be attached to any income return for which it is relevant. Alternatively, any taxpayer filing its return electronically may satisfy this requirement by attaching a statement to the return that provides the date and control number of this letter ruling.

Pursuant to a power of attorney on file in this office, a copy of this letter is being sent to your authorized representatives.

Sincerely,

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Richard K. Passales  
Senior Counsel, Branch 4  
Office of Associate Chief Counsel (Corporate)